UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

METALSA STRUCTURAL PRODUCTS, INC.	)	
and	)	Case 25-CA-165965
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC	)	

RESPONDENT'S POST-HEARING BRIEF

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I. STATEMENT OF THE CASE

This case was tried before Administrative Law Judge Charles J. Muhl (the judge) in Owensboro, Kentucky, on May 24-25, 2016. It involves allegations that Metalsa Structural Products, Inc. (Respondent or Metalsa or the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act) in October 2015[1] in response to an organizing campaign at its Owensboro plant (the plant) by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (the Union).

The Union filed the original unfair labor practice charge on December 11 (GC Exh. 1(a)) and an amended charge on January 29, 2016 (GC Exh. 1(b)). The resulting complaint alleges that Metalsa violated Section 8(a)(1) in five distinct ways during October (GC Exh. 1(e)).

First, the complaint alleges that about October 9, Supervisor Josh Kirby (Kirby) unlawfully interrogated employees about their union activities (GC Exh. 1(e), ¶ 5(a)).

Second, the complaint alleges that about October 9 and 21, Plant Manager Jarrod Rickard (Rickard) informed employees they could lose wages and benefits if they selected the Union (GC Exh. 1(e), ¶ 5(b), ¶ 5(c)(iv)).[2]

Third, the complaint alleges that about October 21, Rickard informed employees it would be futile for them to select the Union (GC Exh. 1(e), ¶ 5(c)(i)).

[1] All dates referenced herein are in 2015, unless otherwise indicated.

[2] At the outset of the hearing, Respondent filed a motion to dismiss these two paragraphs of the complaint on the grounds that they failed to state a claim. The judge took the motion under advisement and permitted the parties to introduce evidence on the allegations. As discussed infra, virtually every witness confirmed that Rickard never told employees they *would* lose wages and benefits if they selected the Union; rather, he explained that employees *could* lose wages and benefits. As explained in Respondent's motion to dismiss, it is not unlawful for an employer to advise employees that, as a result of unionization and collective bargaining, they *could* lose wages and benefits. See *George L. Mee Memorial Hospital*, 348 NLRB 327, 330 (2006) (finding employer did not violate Act where supervisor "merely noted that benefits could go down" and "did not state that benefits and wages would go down"); *International Filling Co.*, 271 NLRB 1591, 1591-1592 (1984) (finding employer did not violate the Act by telling employees they "can lose wages and benefits in collective bargaining"). Consequently, the judge should either grant Respondent's motion to dismiss or conclude, based on the record evidence, that Respondent did not violate the Act as alleged.

Fourth, the complaint alleges that about October 21, Rickard informed employees that bargaining would start from zero if they selected the Union (GC Exh. 1(e), ¶ 5(c)(ii)).

Fifth, the complaint alleges that about October 21, Rickard threatened employees with job loss and plant closure if they selected the Union (GC Exh. 1(e), ¶ 5(c)(iii)).

II. STATEMENT OF FACTS

A. BACKGROUND

Metalsa builds engine cradles and vehicle frames for the automotive industry, including at its Owensboro plant. The plant has approximately 230 employees and operates on three shifts. In September 2015, the Union launched a campaign to organize the plant's hourly employees.[3] (Tr. 20-23.)

B. ALLEGED UNLAWFUL STATEMENTS

In response to the organizing campaign, Rickard led a series of captive audience meetings with employees on each of the three shifts.[4] The first such meeting relevant to this case took place on October 9; the second on October 21; and the third on October 29.[5] (Tr. 23; R. Exhs. 1, 3, 4.) The complaint alleges that Rickard made unlawful statements at one or more of the October meetings (GC Exh. 1(e), ¶¶ 5(b)-(c)).

[3] The Union did not file a representation petition with the Board until November 24, well after the events giving rise to the instant complaint occurred. Pursuant to a stipulated election agreement, an election was held on December 16; however, the Regional Director for Region 25 decided to impound the ballots pending resolution of the Union's charges in this and other cases. Following the Region's investigation of the cases, the Union withdrew all charges and filed the amended charge that led to the instant complaint. Notwithstanding that the only unfair labor practice allegations involved in this case undisputedly occurred before the critical period leading up to the election, the Regional Director has continued to hold the representation case in abeyance—and not open the impounded ballots—until this case has been resolved. See Docket Activity, Case 25-RC-164832 (available at https://www.nlrb.gov/case/25-RC-164832, last accessed June 29, 2016).

[4] The only meetings at issue in this case were those for first shift employees (Tr. 156). All further references to and discussions of meetings in this brief are to the first shift meetings.

[5] Most of the witnesses could not recall the exact dates the meetings were held in October. For purposes of this case, however, the specific dates of the meetings is not particularly relevant. What is relevant here, and what is in dispute, is what Rickard said during those October meetings.

1. General Description of Meetings

The meetings were held in the plant cafeteria (Tr. 24, 27, 62, 71-72, 91, 109, 130, 220, 234, 245, 266.) The cafeteria was described as having tables and chairs and being large enough to accommodate approximately 150 people, including everyone on first shift (Tr. 27, 72, 159, 161, 234, 245, 259, 267, 316). All first shift employees attended the meetings, along with first shift supervisors and managers (Tr. 27-28, 44, 62, 91, 109, 130, 161, 220, 234, 245, 267, 316).

At one end of the cafeteria was a podium with a microphone (Tr. 82, 161-162, 259-260, 267, 308, 316). It is generally undisputed that at each of the three meetings at issue, Rickard stood at the podium and read from (or at least appeared to read from) a script (Tr. 35, 37, 44-45, 48-49, 72-73, 82-84, 100, 110, 116-117, 131, 135-141, 158-160, 162-168, 174-176, 181, 185, 203-204, 209, 220, 228, 234, 241, 245, 254-255, 267, 274-275, 282, 285-286, 291, 301-309, 312-313).[6] A few witnesses recalled Rickard stepping away from the podium with the microphone during some of the meetings (Tr. 82-84, 150, 262-263, 319-320), but most witnesses recalled that he stood behind the podium the entire time (Tr. 162-163, 209, 221, 228-229, 248, 267, 275-276).

Rickard testified that the October meetings was the first time in his career that he had ever used a script to communicate with employees (Tr. 163). Witnesses described Rickard's demeanor reading the scripts during the meetings as "different" (Tr. 204), "odd" (Tr. 204), "monotone" (Tr. 220), "disconnected" (Tr. 234), "straightforward" (Tr. 245), and "awkward" (Tr. 268, 282).

2. Alleged Statement that Employees Could Lose Wages and Benefits

The complaint alleges that Rickard informed employees they could lose wages and benefits if they selected the Union (GC Exh. 1(e), ¶ 5(b), ¶ 5(c)(iv)).

[6] The scripts Rickard used were introduced into evidence as Respondent's Exhibits 1, 3, and 4. Counsel for the General Counsel (the General Counsel) acknowledged at the hearing that nothing in the scripts is alleged or considered to be unlawful (Tr. 9-10).

a. General Counsel's Witnesses

Hourly employee Michael Poore (Poore) testified that Rickard said "we . . . could wind up with less than what we already had" (Tr. 28). In his affidavit provided to the Region during its investigation of the charge in January 2016, Poore admittedly "didn't pay attention to everything" at the meetings and "only listened to the things [he] knew were wrong." At the hearing, Poore further acknowledged: "During the meetings, [Rickard] was reading from a script. I didn't listen, because it was the same thing over and over again." (Tr. 35.) According to Poore, "a lot of [the meetings] seemed like they ran together" (Tr. 40).

Hourly employee Tracy Ferguson (T. Ferguson) initially testified that Rickard said "we could end up with less benefits than we had now" (Tr. 64). She later recalled that Rickard said "we could lose—very possible—he said—very possible that we would lose—have, you know, benefits less than what we have now" (Tr. 82). T. Ferguson explained that Rickard's statement was something he said after reading the script, but it was not in response to a question from anyone (Tr. 83, 85).

Hourly employee Rendell Ferguson[7] (R. Ferguson) initially testified that Rickard said "we would lose all benefits and that we could lose wages" and "[t]here's no guarantee that we—we would be in a better state than what we're in right now" (Tr. 94). He later testified that Rickard said "we could lose wages and benefits" (Tr. 103) and employees "could lose benefits if the union came in" (Tr. 104). R. Ferguson could not recall whether the statements were made at the beginning, middle, or end of the meetings (Tr. 103-104). He admitted that with all the meetings that were held, it was hard to remember what was said (Tr. 101).[8]

[7] Rendell is Tracy Ferguson's husband (Tr. 77).

[8] In his affidavit provided to the Region during its investigation in January 2016, R. Ferguson attested that he could only recall one meeting in October. At the hearing, however, he recalled three meetings. (Tr. 98.)

b. Respondent's Witnesses

Rickard testified that at the October 9 meeting, he did not say anything about whether employees could lose wages or benefits as a result of selecting a union (Tr. 160). He testified that he simply followed the script, which does not discuss what might happen to wages and benefits if employees vote for a union (Tr. 160; R. Exh. 1).

Rickard testified that at the October 21 meeting, consistent with the script (R. Exh. 3), he told employees:

> As a result of good faith negotiations, your wages, benefits, working conditions could remain the same, they could go up, or they could go down. That's right, they could go down. In collective bargaining, a company has the right to request concessions. I'm not saying we would do this or that this would happen. I'm just explaining how the process works.

(Tr. 169-170.) Rickard denied saying at the October 21 meeting that employees would lose wages and benefits if the union came in (Tr. 173).

Rickard testified that at the October 29 meeting, consistent with the script (R. Exh. 4), he again explained to employees that wages and benefits could go up, could stay the same, or could go down. He denied telling employees at the October 29 meeting that wages and benefits would go down as a result of unionization. (Tr. 180.)

Hourly employees LeeAnn Breedlove[9] (Breedlove), Kevin Foster (Foster), Ramona Keller (Keller), and William McCaslin (McCaslin), as well as Supervisor Kirby and managers Scott Quinn (Quinn) and Derek Fogle (Fogle), denied that Rickard ever said employees would lose wages and/or benefits if a union were voted in (Tr. 205, 221, 235, 256, 268, 289, 311).

Breedlove recalled Rickard telling employees that "wages could go up, they could go down . . . [or] [t]hey could stay the same" (Tr. 221).

[9] Breedlove's name was incorrectly transcribed as "Breedlbe."

Foster recalled Rickard telling employees that, "depending on negotiations," they "could" lose wages and benefits (Tr. 235).

Keller recalled Rickard telling employees that wages and benefits "could stay the same, go up, [or] go down" (Tr. 256).

McCaslin recalled Rickard telling employees that "nothing's guaranteed, things could go up, things could go down or things could stay the same" (Tr. 268).

3. Alleged Statement that It Would Be Futile to Select the Union

The complaint alleges that Rickard informed employees that it would be futile for them to select the Union (GC Exh. 1(e), ¶ 5(c)(i)).

a. General Counsel's Witnesses

Poore testified that Rickard said "he would not bargain with the Union.". He recalled Rickard making the statement in response to a question from an employee. (Tr. 41.)

T. Ferguson testified that Rickard said "he didn't have to agree to anything, that he wouldn't" (Tr. 64). She recalled that Rickard "just made that statement" and it was not in response to a question (Tr. 84-85).

R. Ferguson testified that Rickard said that "if we got a union in there, he did not have to cooperate with them, and that he would not cooperate" (Tr. 93). He later testified that Rickard said "he would not negotiate with them" (Tr. 104).

Hourly employee Josh Emery (Emery) testified that Rickard said "he didn't have to work with the unions or agree to any of their proposals" (Tr. 112). He recalled that Rickard did not make the statement in response to a question (Tr. 122-123).

Hourly employee Justin McDaniels (McDaniels) testified that Rickard said "they didn't have to bargain with the union . . ." (Tr. 131). He recalled Rickard making the statement in response

to a question during the middle of the meeting (Tr. 137). He later testified that Rickard said "he wouldn't have to negotiate" (Tr. 147).

b. Respondent's Witnesses

Rickard testified, consistent with the scripts (R. Exhs. 1 and 4), that he did not discuss negotiations or collective bargaining at the October 9 or 29 meetings (Tr. 163, 176).

Rickard testified that at the October 21 meeting, consistent with the script (R. Exh. 3), he told employees: "While we would always negotiate in good faith, we would have the right to say no to proposals we believe are not in the company's best interest from a business standpoint" (Tr. 169).

Rickard denied telling employees at any meeting that it would be futile to select the Union or that he would not bargain, negotiate, cooperate, or work with the Union or agree to their proposals (Tr. 173-174, 179-181). He testified that he always explained to employees that the Company would negotiate in good faith if a union were voted in (Tr. 180).

All of Respondent's other witnesses consistently testified that Rickard never told employees that he would not bargain, negotiate, cooperate, or work with the Union or agree to their proposals (Tr. 205, 222-223, 235-236, 247-248, 268-269, 289-290, 310-312).

4. Alleged Statement that Bargaining Would Start from Zero

The complaint alleges that Rickard informed employees that bargaining would start from zero if they selected the Union (GC Exh. 1(e), ¶ 5(c)(ii)).

a. General Counsel's Witnesses

Poore testified that Rickard said that "when we do go to negotiations, that we would start with zero on pay and benefits . . ." (Tr. 28). He recalled that Rickard made the statement in response to a question from an employee (Tr. 37, 41).

T. Ferguson testified that Rickard said that "we would start from ground zero . . ." (Tr. 64).[10] She recalled that Rickard did not make the statement in response to a question (Tr. 83).

R. Ferguson testified that Rickard said that "if we got a union in there, we would not—we would start at ground zero" (Tr. 93). He could not recall whether the statement was made at the beginning, middle, or end of the meeting (Tr. 104).

Emery testified that Rickard said that "with a union . . . our benefits could go to zero, and we could start with nothing" (Tr. 120). He recalled that Rickard's statement was not in response to a question (Tr. 122-123).

McDaniels testified that Rickard said: "[A]ll of our benefits, perks, and pay will go to zero. It would start all over again" (Tr. 131). He recalled that Rickard's statements were not in response to a question (Tr. 138-139).

b. Respondent's Witnesses

Rickard denied ever telling employees that bargaining would start from zero or ground zero if a union were voted in (Tr. 163, 174, 180). Rickard explained: "I just covered, you know, what was in the script. They could go up, they could stay the same, or they could go down" (Tr. 180).

All of Respondent's other witnesses consistently testified that Rickard never made any statements to the effect that if a union were voted in, bargaining would start from zero or ground zero (Tr. 205, 222-223, 235, 247, 269, 289-290, 311).

5. Alleged Statement that Employees Would Lose Jobs and the Plant Would Close

The complaint alleges that Rickard threatened employees with job loss and plant closure if they selected the Union (GC Exh. 1(e), ¶ 5(c)(iii)).

[10] In her affidavit provided to the Region during its investigation in January 2016, T. Ferguson attested that Rickard said "bargaining would start from zero in terms of our pay and benefits." She acknowledged at the hearing that she did not mention the word "ground" in her affidavit. (Tr. 86.)

a. General Counsel's Witnesses

Poore testified that Rickard said that "if production was interrupted with Toyota, then Toyota would pull out" (Tr. 28).

T. Ferguson testified that Rickard said: "You know that Toyota is the only thing keeping us afloat, and we have to take care of them" (Tr. 68). She did not recall Rickard saying that the plant would close (Tr. 84).

R. Ferguson testified that Rickard said that "Toyota would pull out if they heard they were trying to get a union in there" (Tr. 92).

Emery testified that Rickard said that "if there was any disruptions called by unions and the supplies to Toyota, that they would pull out, and we would no longer have them as a customer." He then recalled someone asking Rickard "if that meant we would lose our jobs," to which he testified that Rickard replied, "Yes, that is what that means." (Tr. 112.) Emery later admitted that Rickard said "if there were disruptions in supply to Toyota, they could pull out" (Tr. 122).

McDaniels testified as follows:

> [Rickard] was saying on the 26th, that if—that if a—we did go out on a strike, it would hurt the—the work flow. Like, they wouldn't be able to produce enough cradles or, you know, frames, and that—and that Toyota could pull—would pull the fixtures. He would—it would have to take other measures, and he was talking about—somebody asked him, "Well, could they pull out the fixtures?" And he said, "No, they can pull out the tool in front of the fixtures, but they own the tooling but not the fixtures." And somebody asked if they—if they're saying Toyota would or could pull out, and he said "would."

(Tr. 132.)

b. Respondent's Witnesses

Rickard testified that he did not comment about or reference Toyota during the October 9 meeting, which is consistent with the script (Tr. 163; R. Exh. 1).

Rickard testified that at the October 21 meeting, consistent with the script (R. Exh. 3), he said the following:

> The timing of this steelworkers activity could not be worse. You know that Toyota is currently evaluating the most cost effective way and reliable way to get the products we produce for them. Now, more than ever, we need to work together to show Toyota that we are a reliable supplier of high-quality, low-cost products. Anything that makes it harder for us to do this could be a problem.

(Tr. 172-173.)

Rickard testified that at the October 29 meeting, he was asked if Toyota owned the tooling in the plant. He recalled answering that "yes, they did own the tooling but not the robots and the equipment around it." (Tr. 178.)

Rickard denied stating at any of the meetings that if the employees voted in favor of a union, Toyota would pull out, or would pull out its tooling (Tr. 179). He also denied ever stating that if there were any disruptions, Toyota would leave and employees would lose their jobs (Tr. 181).

All of Respondent's other witnesses consistently testified that Rickard never made any statements to the effect that Toyota would leave, employees would lose their jobs, and/or the plant would close if a union were voted in (Tr. 205, 223, 236, 247, 250, 269, 290, 311).

Some of Respondent's witnesses testified that they recalled questions about Toyota during at least one of the meetings. Breedlove testified that at the October 9 meeting employee Shane Barrett asked Rickard what Toyota thought about the Union, and Rickard responded that "we had to stay competitive"; "union or nonunion didn't make a difference on what Toyota [did]"; and "we had to stay competitive and still do what we needed to do to keep Toyota happy as far as our product, our quality" (Tr. 224).

Keller recalled a question about Toyota during the October 29 meeting. She testified that someone asked, "Will Toyota stop doing business with us, if we get a union in?" She recalled Rickard responding that "our focus is to stay competitive, win business, he said that's what keeps our doors open." (Tr. 249.) Keller added that anytime questions were asked about Toyota, Rickard "always said, our focus is staying competitive" (Tr. 256).

Quinn recalled that someone asked Rickard during a meeting what Toyota owns, and Rickard responded, "the tooling" (Tr. 292).

C. ALLEGED INTERROGATION

The complaint alleges that about October 9, Kirby unlawfully interrogated employees about their union activities (GC Exh. 1(e), ¶ 5(a)). The General Counsel offered two witnesses to support this allegation: Poore and a former temporary worker, Victor Selle (Selle).[11] Kirby testified on behalf of Respondent.

1. General Counsel's Witnesses

Poore testified that on October 9 at 2:30 p.m., shortly after Rickard spoke to employees at the meeting, his supervisor, Kirby, approached him and asked him what he thought about "the activity." Poore said he responded by asking Kirby, "What activity?", to which Kirby allegedly replied, "the union activity." Poore testified that he (Poore) then said: "Well, I don't know. What do you think?" At that point, according to Poore, Kirby began to talk about how he previously worked for a plant that had a union, and how the union never did anything for him. Poore recalled Kirby saying "every time that they got a pay raise, . . . their insurance premiums would go up." (Tr. 29-30.)

[11] Selle was employed by a staffing company, Malone Staffing, and assigned to the plant from July 2015 to February 2016 (Tr. 52).

Poore testified that he was by the Tundra service line where excess parts are stored when Kirby approached him (Tr. 29). He acknowledged that it was not unusual for Kirby to walk around and ask him and other employees how they were doing (Tr. 46). According to Poore, no work was taking place because they were "done for the day" (Tr. 48).[12] Poore testified that Selle was present when Kirby approached him (Tr. 29).

Selle testified: "I remember Josh Kirby coming up to talk to Michael Poore and asked him what he thought about the union. [Poore] said he didn't—said he kind of—said, 'I don't know. What do you think about the union?' And the conversation continued from there." Selle further testified that Kirby "said his dislike of unions because he had been involved with them before, didn't care for it." (Tr. 54.)

Selle recalled that the incident occurred in the fall of 2015, "[p]robably between, say, September, November" (Tr. 54). He testified that he and Poore were "probably ending the work and cleaning up" (Tr. 55). He clarified, however, that they were still working and were wearing earplugs (Tr. 56).

2. Respondent's Witness

Kirby denied ever asking Poore what he thought about the Union. He acknowledged having a conversation with Poore about the Union in October after one of Rickard's meetings, but, according to Kirby, Poore initiated the discussion. Kirby explained:

> I was doing my . . . end-of-day rounds, and I walked up to [Poore] and asked him how he was doing. He said, "Okay." And then he asked me—he said, "What do you think about everything going on?" And I told him that I worked for a union before, and every time that we got a raise, the union would always raise their dues, and insurance would go up.

(Tr. 199-200.)[13]

[12] Poore acknowledged that when work is being done, it is more difficult to hear in the area (Tr. 48).

[13] Kirby assumed Poore was referring to the Union activity when he asked Kirby what he thought about "everything going on," because they had just attended Rickard's meeting about the Union activity (Tr. 203).

Kirby testified that the Tundra line was not running at the time this conversation occurred, but Poore was filling up parts to get ready for the next day. Kirby said that other lines were running, so it was somewhat loud and everyone was wearing earplugs. (Tr. 201-202.) Kirby testified that he had been trained, as a supervisor, on whether he can ask employees what they think about unions. He explained that he knew it was lawful to share experiences and opinions about unions. (Tr. 205-206.)

III. LEGAL ARGUMENT

The General Counsel failed to prove by a preponderance of the evidence that Metalsa violated the Act as alleged in the complaint. See *Unifirst Corp.*, 346 NLRB 591, 593 (2006) (observing that "the General Counsel bears the burden of establishing by a preponderance of the evidence" that the respondent violated the Act). The credible evidence reflects that Rickard lawfully communicated with employees about the perils of unionization during the October meetings, and Kirby did not unlawfully ask Poore what he thought about the union activity.

A. ALLEGED UNLAWFUL STATEMENTS

1. Credibility Resolutions

The General Counsel's witnesses' testimony that Rickard made unlawful statements during the October meetings should not be credited. It was inconsistent, contradictory, shifting, and implausible. Respondent's witnesses' testimony, on the other hand, was forthright, consistent in all material respects, and logical.

a. The General Counsel's Witnesses had Inconsistent Recollections

First, the General Counsel's witnesses had remarkably inconsistent recollections about what Rickard actually said during the meetings and whether or not what he said was in response to questions from employees. See *Stabilus, Inc.*, 355 NLRB 836, 840 fn. 19 (2010) ("The lack of

corroboration from [a General Counsel witness] weakens the General Counsel's case."); *Ithaca Industries*, 275 NLRB 1121, 1123 (1985) ("There are inconsistencies in the testimony of the General Counsel's witnesses concerning the remarks of [two supervisors] which raise a doubt as to the credibility of such testimony.").

Regarding the "lost wages and benefits" allegation, only T. Ferguson and R. Ferguson recalled Rickard saying words to the effect that employees "would lose benefits" (Tr. 82, 94).[14] Poore, in contrast, testified that Rickard said "we . . . could wind up with less than what we already had" (Tr. 28). T. Ferguson testified that Rickard did not make the statement in response to a question (Tr. 83, 85). Neither R. Ferguson nor Poore testified about whether Rickard made the statement in response to a question. The General Counsel's other two witnesses who testified about Rickard's meetings—Emery and McDaniels—did not testify that Rickard said anything about losing wages and benefits.

Regarding the "futile to select the Union" allegation, the General Counsel's witnesses were all over the place. Poore testified that Rickard said "he would not *bargain* with the Union" (Tr. 41). T. Ferguson testified that Rickard said "he didn't have to *agree to anything*, that he wouldn't" (Tr. 64). R. Ferguson testified that Rickard said that "he did not have to *cooperate* with them, and that he would not cooperate" (Tr. 93) and that "he would not *negotiate* with them" (Tr. 104). Emery testified that Rickard said "he didn't have to *work with* the unions or agree to any of their proposals" (Tr. 112). McDaniels testified that Rickard said "they didn't have to *bargain* with the union . . ." (Tr. 131) and "he wouldn't have to *negotiate*" (Tr. 147). Poore and McDaniels recalled that Rickard made the statements in response to questions (Tr. 41, 137). T. Ferguson and Emery recalled that Rickard was *not* responding to questions (Tr. 84-85, 122-123).

[14] As discussed infra, T. Ferguson and R. Ferguson contradicted themselves by also testifying that Rickard said employees "could" lose benefits (Tr. 64, 103-104).

Regarding the "bargaining from zero" allegation, Poore, Emery, and McDaniels testified that Rickard said pay/benefits would start from "zero" (Tr. 28, 120, 131). T. Ferguson and R. Ferguson, on the other hand, recalled Rickard saying pay/benefits would start from "ground zero" (Tr. 64, 93).[15] Poore testified that Rickard made the statement in response to a question (Tr. 37, 41). T. Ferguson, Emery, and McDaniels testified that Rickard was not responding to a question (Tr. 83, 122-123, 138-139).

Regarding the "job loss and plant closure" allegation, again the General Counsel's witnesses were all over the place.[16] Poore and T. Ferguson did not testify that Rickard specifically linked the Union with Toyota leaving. Poore testified that Rickard said that "if production was interrupted with Toyota, then Toyota would pull out" (Tr. 28). T. Ferguson testified that Rickard said, "You know that Toyota is the only thing keeping us afloat, and we have to take care of them" (Tr. 68).

R. Ferguson, Emery, and McDaniels testified that Rickard did specifically link the Union with Toyota leaving, but their recollections of what he said varied dramatically. R. Ferguson testified that Rickard said "Toyota would pull out if they heard they were trying to get a union in there" (Tr. 92). Emery testified that Rickard said Toyota would pull out if "there was any disruptions called by unions and the supplies to Toyota" (Tr. 112). McDaniels testified that Rickard said Toyota would pull out if employees went "out on a strike" and it "hurt . . . the work flow" (Tr. 132). Thus, only R. Ferguson recalled Rickard attributing Toyota leaving to the Union's

[15] As discussed infra, T. Ferguson stated in her January 2016 affidavit that Rickard said bargaining would start from "zero" (Tr. 86).

[16] The only material consistency with respect to this allegation was that none of the General Counsel's witnesses testified that Rickard told employees the plant would close. T. Ferguson even specifically denied ever hearing Rickard make such a statement (Tr. 84).

mere presence. Emery and McDaniels recalled Rickard attributing Toyota leaving to the Union's conduct in causing a strike or other disruption.

b. The General Counsel's Witnesses Contradicted Themselves

Not only did the General Counsel's witnesses fail to testify consistently with each other about a single allegation, in many instances, they failed to testify consistently with themselves. See *Industrial Waste Service*, 268 NLRB 1180, 1184 (1984) ("[T]here are points when misstatements of material facts are so frequent that a fact-finder must conclude that there is evidenced more than innocent and pardonable confusion. I credit the denials of all of the Respondent's witnesses and credit none of the alleged violations testified to as having occurred . . . .").

For example, T. Ferguson and R. Ferguson inconsistently testified both that Rickard said "we could lose" and "we would lose" (Tr. 64, 82, 94, 103-104). Neither of them clarified whether Rickard actually used both phrases or whether they simply could not recall which of the two he used.

Similarly, Emery initially testified that Rickard said Toyota "would pull out" (Tr. 112), but then later admitted that Rickard said Toyota "could pull out" (Tr. 122). Emery never clarified which phrase Rickard used, or whether he used both.

Several of the General Counsel's witnesses also contradicted what they said in affidavits provided to the Region during its January 2016 investigation of this case. Poore, for instance, stated in his affidavit that he did not recall any questions during the October 9 meeting (Tr. 38), but at the hearing he specifically recalled Rickard "walk[ing] around the crowd with a microphone answering questions" (Tr. 37).

Likewise, in his affidavit, R. Ferguson attested that he could only recall one meeting in October. At the hearing, however, he happened to recall three distinct meetings. (Tr. 98.)

Finally, T. Ferguson testified at the hearing that Rickard told employees they would start from "ground zero," but in her January 2016 affidavit, she attested that Rickard said "zero" (Tr. 64, 86). She could not explain the contradiction.

c. The General Counsel's Witnesses' Testimony is Unreliable for Other Reasons

A number of other factors demonstrate that the General Counsel's witnesses are not credible sources of information about what Rickard actually said during the October meetings.

First, the General Counsel offered only five witnesses to support the allegations against Rickard out of nearly 130 employees who attended the meetings. See *Ithaca Industries*, 275 NLRB at 1124-1125 ("In assessing their credibility regarding the speech, it is noteworthy that [the General Counsel's witnesses] represent only 3 of the 75 to 100 employees who heard the speech.").

Second, the General Counsel failed to offer a single witness to testify that Rickard said anything unlawful during the second- or third-shift meetings, at which the same subject matter was discussed. See id. at 1125 ("It is odd, and indeed unlikely, that [the director] would choose only [the first group] to make the unlawful remarks attributed to him and not repeat such remarks to the other groups. Yet, the General Counsel produced no witnesses from the other groups to establish that the remarks were repeated.").

Third, some of the General Counsel's witnesses made statements in their affidavits and/or during the hearing that undermine the reliability of their recollections. For instance, in his January 2016 affidavit, Poore admittedly "didn't pay attention to everything" at the meetings and "only listened to the things [he] knew were wrong" (Tr. 35). At the hearing, Poore further acknowledged: "During the meetings, [Rickard] was reading from a script. I didn't listen, because it was the same

thing over and over again." (Tr. 35.) According to Poore, "a lot of [the meetings] seemed like they ran together" (Tr. 40).

R. Ferguson likewise admitted that with all the meetings that were held, it was hard to remember what was said (Tr. 101). Moreover, he could not recall whether any of the alleged unlawful statements were made at the beginning, middle, or end of the meetings (Tr. 103-104).

Fourth, Respondent's witnesses Quinn and Fogle testified that T. Ferguson and R. Ferguson took notes during at least some of the October meetings (Tr. 287, 292-293, 307). However, no notes were produced to Respondent or introduced into the record by the General Counsel or the Union.[17] Moreover, neither the General Counsel nor the Union re-called T. Ferguson or R. Ferguson, or called anyone else, to rebut Quinn's and Fogle's testimony. See *Bricklayers Local 1 of Missouri*, 209 NLRB 1072, 1075 (1974) ("Bricklayers failed to call Flynn as a witness to rebut the mutually corroborative adverse testimony of Simon, Hoffman, and Happe, and offered no explanation for not doing so. In these circumstances, an inference is warranted that, if Flynn had been called to testify, his testimony would not have assisted Bricklayers[']cause.").

d. Respondent's Witnesses were Credible

Respondent's witnesses offered reliable, credible testimony during the hearing. Their demeanor on the stand was calm and collected. They did not contradict each other or themselves on material facts. They were confident in their responses, particularly with respect to denying that Rickard made any of the alleged unlawful statements during the October meetings. (Tr. 205, 221-223, 235-236, 247-248, 250, 256, 268-269, 289-290, 311-312.)

Respondent's witnesses also consistently and confidently recalled other important details from the meetings, which reinforces the validity of their denials. For instance, they all recalled that

[17] Respondent issued a subpoena duces tecum to the Union requesting that it produce, inter alia, any notes or recordings of the October meetings.

Rickard looked down, appeared to read from a script, and said he was reading from a script during the meetings (Tr. 220, 234, 245, 267). They also recalled many of the lawful statements that are in the scripts, including that wages and benefits could go up, stay the same, or go down (Tr. 221, 256, 268; R. Exhs. 3, 4), that the Company still had to be competitive whether a union was voted in or not (Tr. 222, 246; R. Exhs. 1, 3, 4), and that the Company would bargain with the Union if it were elected (Tr. 268; R. Exh. 3).

The General Counsel offered nothing to discredit Respondent's hourly witnesses. Indeed, the only witness that Respondent even arguably attempted to discredit was Rickard. The General Counsel's efforts in that regard, however, were feeble and, ultimately, irrelevant.

First, the General Counsel attempted to discredit Rickard by introducing an October 27 email between Production Manager Jonathan Cecil and Rickard in which Rickard said: "Tell Kirby to text me tonight if he sees additional cars at Riney's. I wish somehow the eagles (sic) wasn't out of the way to see that parking lot. I don't want us to get caught though." (GC Exh. 5.) Rickard explained at the hearing that "Riney" referred to employee Jeremy Riney,[18] who lived in Kirby's neighborhood across the street, and "Eagles" referred to a club that Rickard had heard the Union met at on occasion (Tr. 183-184).

By introducing this evidence, the General Counsel appeared to be suggesting that Rickard was encouraging Kirby to engage in unlawful surveillance. A plain reading of the email in light of Rickard's testimony about where Kirby and Riney live in relation to one another, however, makes clear that Rickard was in no way asking Kirby to do something unlawful. He was simply asking Kirby to report what he lawfully observed without doing anything out of the ordinary. This is buttressed by Rickard's reference to wishing Eagles was not out of the way. Finally, the reference

[18] Riney's name was incorrectly transcribed as "Ronnie."

to "not getting caught" does not suggest illegality; rather, it suggests that Rickard wanted Kirby to act lawfully.

Regardless of Rickard's intent in sending the email, that has nothing to do with Rickard's credibility about what he said during the October meetings, which is the only relevant issue here. More importantly, Rickard's credibility is not tied to Respondent's other witnesses, all of whom were very credible and confirmed that Rickard did not make the unlawful statements he is alleged to have made.

Second, the General Counsel introduced an October 9 email from Rickard to his boss Steve Ballenger and then-Human Resources Coordinator Michael Marsh that read:

> I completed the communications on 1st and 2nd shift today. Received some positive feedback from 1st shift on the communication. They were glad we did it. 1st shift asked several questions. Mainly about new business opportunities. One of the team members asked the most perfect question for the setting ever…What would Toyota think if our plant went Union? This opened the door up for me! I think overall this communication was very beneficial.

(GC Exh. 2.)

The General Counsel was apparently attempting to discredit Rickard's recollection that no questions were asked following the first meeting. As Rickard credibly explained, however, his email was not referring to a question during the meeting, but rather, a question raised on the floor sometime after the meeting ended (Tr. 188). Regardless, as with the October 27 email the General Counsel introduced, this email has nothing to do with Rickard's credibility about what he said during the October meetings.

Accordingly, the General Counsel's attempt to discredit Rickard through the emails proves nothing.

2. Statements Not Unlawful

Even assuming the General Counsel's witnesses were credible, at least some of what they testified Rickard said during the October meetings is not unlawful. See *Winkle Bus Co.*, 347 NLRB 1203, 1205 (2006) ("It is well settled that, absent threats or promise of benefits, an employer is entitled to explain the advantages and disadvantages of collective bargaining to its employees in an effort to convince them that they would be better off without a union.") (citing *Langdale Forest Products Co.*, 335 NLRB 602 (2001)).

First, as argued in Respondent's motion to dismiss, it is not unlawful for an employer to advise employees that, as a result of unionization and collective bargaining, they *could* lose wages and benefits. See *George L. Mee Memorial Hospital*, 348 NLRB 327, 330 (2006) (finding employer did not violate Act where supervisor "merely noted that benefits could go down" and "did not state that benefits and wages would go down"); *International Filling Co.*, 271 NLRB 1591, 1591-1592 (1984) (finding employer did not violate the Act by telling employees they "can lose wages and benefits in collective bargaining"). Thus, to the extent the judge finds that Rickard told employees they could lose wages and benefits, the allegation should be dismissed.[19]

Second, even if Rickard told employees that negotiations over wages and benefits would start from zero, such a statement would not necessarily be unlawful. See *Plastronics, Inc.*, 233 NLRB 155, 156 (1977) (finding that comments about bargaining "from scratch" or "starting with zero" are not objectionable/unlawful "when additional communication to the employees dispels any implication that wages and/or benefits will be reduced during the course of bargaining and

[19] Of course, it is unlawful to tell employees they will lose wages and benefits as a result of unionization. See *Zero Corp.*, 262 NLRB 495, 515 (1982) (employer unlawfully told employees that "if the Union was voted in all the employees would lose their benefits"). As discussed above, however, only two witnesses testified (albeit not credibly) that Rickard told employees they "would" lose benefits, and no witnesses testified that Rickard told employees they "would" lose wages.

establishes that a reduction in wages or benefits will occur, only as a result of the normal give and take of collective bargaining . . .”). Here, multiple witnesses confirmed that Rickard told employees, consistent with the script, that wages, benefits, and working conditions could go up, could stay the same, or could go down (Tr. 169-170, 221, 235, 256, 268). Thus, regardless of whether Rickard also mentioned that employees would start from zero or ground zero at bargaining, his additional communications dispelled any implications that wages and benefits will definitely be reduced during bargaining.

Accordingly, even accepting the highly incredible and implausible testimony from some of the General Counsel’s witnesses, the judge should not find merit to all of the complaint allegations regarding the October meetings.

B. ALLEGED INTERROGATION

1. Credibility Resolutions

The judge should not credit General Counsel witnesses Poore and Selle over Respondent witness Kirby about the alleged interrogation.

First, Poore and Selle did not testify consistently about the allegation. Poore stated that Kirby approached him and asked what he thought about “the activity,” which, according to Poore, prompted him to ask Kirby, “What activity?” (Tr. 29-30.) Selle, on the other hand, stated that Kirby approached Poore and directly asked him what he thought about the Union (Tr. 54).

Second, Poore testified that he was not working at the time Kirby approached him (Tr. 48). Selle, in contrast, testified that he and Poore were working at the time (Tr. 56).

Third, Selle’s testimony is particularly unreliable, given that he had a very vague recollection of when the event supposedly occurred. According to Selle, the incident happened sometime in the fall of 2015, “[p]robably between, say, September, November” (Tr. 54).

Fourth, if Kirby had questioned Poore about his union sentiments, it seems logical that Kirby would have also asked other employees about theirs. Yet the General Counsel offered no other evidence to suggest that Kirby questioned anyone but Poore.

Finally, Poore stated in his January 2016 affidavit that he had never been disciplined by Kirby. However, at the hearing, he acknowledged that Kirby did discipline him in April 2013 for throwing a part. (Tr. 43-44.)

Kirby, in contrast, testified consistently and had a strong recall of the event. Moreover, he confirmed that he had been trained on how he could respond to employee questions about unionization. (Tr. 205-206.)

2. Questioning not Unlawful

As a final matter, even if Poore's and Selle's testimony is credited, it is insufficient to establish a violation of the Act. The Board has observed that the Act "does not make it illegal per se for employers to question employees about union activity." *Amcast Automotive of Indiana, Inc.*, 348 NLRB 836, 837 (2006). To establish a violation, the General Counsel must prove that "under all of the circumstances the interrogation reasonably tend[ed] to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel Employees and Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). See also *Toma Metals, Inc.*, 342 NLRB 787 (2004) (supervisor asking employee "what's up with the rumor of the union I'm hearing" did not violate the Act.) Relevant factors include the background of the relationship, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Rossmore*, 269 NLRB at 1177 fn. 20.

Accepting Poore's and Selle's testimony, the evidence in this case, at best, reflects that on a single occasion more than one month before an election petition was even filed, a supervisor

approached an employee while he was cleaning up and asked him what he thought about "the activity." There is no evidence that Kirby threatened Poore with adverse action based on his response; Poore did not answer Kirby's question but instead responded: "I don't know. What do you think?"; there is no evidence that Kirby similarly questioned other employees; and there is no allegation or evidence that Kirby committed any other unfair labor practices.

Given these circumstances, the General Counsel has failed to carry his burden, even if Poore's and Selle's testimony is credited.

IV. CONCLUSION

The judge should find, based on the overwhelming record evidence, that Metalsa did not violate the Act as alleged in the complaint. The General Counsel's witnesses were not credible. They did not have strong recollections and could not tell a consistent story. Respondent's witnesses, on the other hand, were forthright and offered corroborative testimony that was logical. Finally, most of the alleged conduct testified to by the General Counsel's witnesses is not unlawful under Board precedent.

Respectfully submitted,

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Dated this 29th day of June, 2016

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

METALSA STRUCTURAL PRODUCTS, INC.	)	
and	)	Case 25-CA-165965
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Respondent Metalsa Structural Products, Inc.'s Post-Hearing Brief in the above case has been served on the following by electronic mail:

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